



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Federal Construction, Inc.

File: B-279638; B-279638.2

Date: July 2, 1998

Abel Carreon for the protester.

Robert E. Korroch, Esq., United States Coast Guard, for the agency.

Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly rejected as nonresponsive bid that failed to include acknowledgment of a material solicitation amendment that affected contract performance by specifying the size and type of circuit breaker required by the agency, resolving solicitation ambiguity as to the actual circuit breaker required.

DECISION

Federal Construction, Inc. protests the rejection of its low bid as nonresponsive under invitation for bids (IFB) No. DTCGG1-98-B-QEE016, issued by the Department of Transportation, U.S. Coast Guard (USCG), for renovations to Chase Hall at the USCG Academy, New London, Connecticut. Federal's bid was rejected as nonresponsive because it did not contain an acknowledgment of amendment No. A0001, which the agency considered material. Federal contends that the amendment simply clarified solicitation terms and thus was not material; Federal asserts that its failure to acknowledge the amendment prior to bid opening should be waived as a minor informality.

We deny the protest.

The IFB, issued on February 13, 1998, was amended on March 6 to, among other things, add the following provision, regarding electrical wiring in the laundry room, to sheet 8 of 9 of IFB drawing No. CC-883-7050:

Contractor shall provide new 200-amp circuit breaker (3-phase, 4-wire, 60-cycles) for new Laundry Room Circuit, to be compatible with existing General Electric (GE) switchgear. (Reference: GE breaker #TFJ236200). Contractor shall provide all materials and fittings for a complete circuit installation.

Amendment No. A0001 at 2.

The amendment was issued after a potential bidder pointed out that the IFB, as issued, did not identify the exact circuit breaker size or type required. Potential bidders were advised that the amendment had to be acknowledged and that failure to do so could result in rejection of the bid.

Seven bids were received in response to the IFB by the March 16 bid opening. Federal submitted the apparent low bid of \$85,219, but failed to acknowledge receipt of amendment No. A0001 prior to bid opening. Finding that the amendment affected performance of the contract and the contractor's obligations under the contract, the agency rejected Federal's bid as nonresponsive for failure to acknowledge a material amendment. This protest followed.¹

Federal protests that the amendment was not material since it only clarified the contractor's obligations under the contract, and that its failure to acknowledge the amendment should have been waived as a minor informality.

A bidder's failure to acknowledge a material amendment to an IFB renders the bid nonresponsive, since absent such an acknowledgment the government's acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amendment. Specialty Contractors, Inc., B-258451, Jan. 24, 1995, 95-1 CPD ¶ 38 at 2. On the other hand, a bidder's failure to acknowledge an amendment that is not material is waivable as a minor informality. Federal Acquisition Regulation (FAR) § 14.405. An amendment is material where it imposes legal obligations on a prospective bidder that were not contained in the original solicitation or if it would have more than a negligible impact on price, quantity, quality, or delivery. FAR § 14.405(d)(2); Specialty Contractors, Inc., supra, at 2.

¹The Federal bid initially had been rejected as nonresponsive for failure to acknowledge the amendment, as well as for failure to submit a bid guarantee. As Federal points out, however, subsequent communications to Federal from the agency indicated that the sole basis of rejection was the failure to submit the bid guarantee. For that reason, Federal initially protested only the agency's rejection of its bid as nonresponsive for failure to submit a bid guarantee. In response to that protest, the agency conceded that no bid guarantee was required under the IFB, rendering the protest basis academic. East West Research, Inc.--Recon., B-233623.2, Apr. 14, 1989, 89-1 CPD ¶ 379 at 2. The agency, however, also notified Federal that, contrary to earlier information conveyed by agency personnel suggesting otherwise, the agency still considered the bid nonresponsive for failure to acknowledge the amendment. Federal thereafter amended its protest to challenge the agency's determination that its bid was nonresponsive for failure to acknowledge the amendment. We consider the amended protest timely in light of the agency's earlier inconsistent communications with the bidder regarding the basis for rejection of its bid.

The IFB included, as an attachment, "specification # 7050," a detailed work statement for the project which, at section 16140, paragraph 1.4A, regarding quality assurance for wiring devices, required contractor compliance with "NFPA 70, National Electrical Code" (NEC) provisions for devices and installation. According to the protester, the NEC dictates which size of circuit breaker is to be used for certain types of cables, and an experienced electrical contractor could deduce from the IFB's cable descriptions that a 200-amp or 225-amp circuit breaker would be required, depending on the cable involved.² Despite the reference to the NEC, however, at least one prospective bidder had questioned the IFB's failure to specify the exact size and type of circuit breaker required for the laundry room electrical wiring work. The agency issued amendment No. A0001 after agreeing that the IFB, as issued, failed to unambiguously set forth that only a 200-amp circuit breaker would be acceptable for the laundry room area.

The amendment provision specifying the 200-amp circuit breaker was considered a significant solicitation requirement because, according to the agency's electrical system inspector, no other size circuit breaker would fit the existing electrical equipment to be used at the location. In this regard, the agency reports that although, as the protester points out, the IFB's incorporation of the NEC suggests that either a 200-amp or a 225-amp circuit breaker may be appropriate for the type of cables depicted in the relevant IFB drawing (at sheet 8 of 9), the 200-amp circuit breaker is the only one that can be used here.

Specifically, the electrical system inspector states that installation of a 200-amp circuit breaker was intended by the agency since the laundry room circuitry was designed "to be fed from the existing 32-year-old General Electric Switchgear. The existing switchgear has one remaining slot. That slot is sized for a 200-amp 3-pole breaker." Declaration of John Wakely at 1. He further states that the existing copper bus bar (distributing the electrical current), intended to be used here, is also sized for a 200-amp circuit breaker. Id. As the contracting officer explains, the agency needed to amend the IFB to clearly provide that the agency wanted only a 200-amp unit here, since a 225-amp circuit breaker simply could not be physically accommodated by the existing equipment to be used under the contract; in fact, specifying a 200-amp unit was especially warranted given that, as the protester acknowledges, the NEC suggests use of a 225-amp circuit breaker for certain of the cables involved here. Without the amendment, the agency considered the IFB defective in that the agency's circuit breaker needs were inadequately defined (since no size or type was identified for the laundry room circuitry and the existing electrical components (switchgear and panel) that were to be used were not

²The circuit breaker provides overcurrent protection to the electrical conductors by interrupting the electrical circuit for abnormal overcurrent conditions. The agency points out that cables are required to be protected against overcurrent in accordance with their ampacities. Contracting Officer's Statement at 4.

adequately described); ambiguous (because the NEC may have suggested another size was acceptable); and could lead to potential litigation over the laundry room circuitry, namely the circuit breaker, actually required by the terms of the contract.

Federal contends that its failure to acknowledge the amendment should be waived since, according to Federal, the amendment imposed no additional legal obligation on the contractor. Federal states that by the terms of the IFB, it was obliged to deliver the circuit breaker needed by the agency since whatever circuit breaker was provided would have to be compatible with existing equipment to achieve proper system operation. Federal contends that since the NEC requires that "a 200 amp or 225 amp protector shall be used for the cable," the contractor would already be obliged to provide a 200-amp circuit breaker even without the amendment. Amended Protest at 10. The protester asserts that its bid therefore was improperly rejected.

We disagree. According to the protester's own statements, see id.; Protester's Comments on Agency Report at 10-12, even an experienced electrical contractor could interpret the IFB, as issued, as permitting either a 200- or a 225-amp circuit breaker, given the IFB's identification of the cables involved. The agency has shown, however, that only the 200-amp circuit breaker will meet its actual needs, and the requirement for a 200-amp circuit breaker was not in the IFB specifications prior to the issuance of amendment No. A0001. Without an acknowledgment of the amendment setting forth the required 200-amp size, it is unclear from Federal's bid which circuit breaker the protester agreed to deliver; if Federal's bid were accepted, the potential for contractor claims and litigation of the matter could arise. It is just this type of potential litigation that the agency sought to avoid in issuing the specific 200-amp requirement in the amendment, which, in our opinion, reasonably resolved the solicitation defect prior to bid opening. Air Quality Experts, Inc., B-256444, June 15, 1994, 94-1 CPD ¶ 374 at 2. Amendments clarifying matters which could otherwise engender disputes during contract performance, as here, are generally material and must be acknowledged. Id.

In sum, the amendment did more than clarify the agency's requirement--it removed an ambiguity which affected the size of the circuit breaker. Regardless of the price difference between the 200- and 225-amp circuit breakers, the amendment is material because it affects the quality of a required item, as well as the contractor's

obligation to provide the amendment item. ACC Constr. Co., Inc., B-277554, Sept. 22, 1997, 97-2 CPD ¶ 84 at 2. Since Federal's bid, without acknowledgment of amendment No. A0001, does not represent a commitment to perform exactly as required by the amendment, the agency properly rejected Federal's bid as nonresponsive.

The protest is denied.

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